FILE COPY

FILED
JAN 11 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 96

A. T. GORDON, ET AL.,
Petitioners and
Intervening Defendants Below,

vs.

GRANVILLE H. LANCE, ET AL.,
Respondents and Plaintiffs Below,

AND

THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, *a corporation,* ET AL.,
Respondents and Defendants Below.

AMICI CURIAE BRIEF

ON BEHALF OF
THE CITY OF SAN DIEGO, CALIFORNIA
AND THE COUNTY OF SAN DIEGO, CALIFORNIA

JOHN W. WITT, *City Attorney*
City of San Diego, and
CURTIS M. FITZPATRICK,
Chief Deputy City Attorney
By CURTIS M. FITZPATRICK
City Administration Building
San Diego, California 92101
Tel: (714) 236-6220
ROBERT G. BERREY, *County Counsel*
of San Diego County, and
JOSEPH KASE, JR.,
Deputy County Counsel
By JOSEPH KASE, JR.
302 County Administration Center
San Diego, California 92101
Tel: (714) 239-7711, Ext. 451
Attorneys for Amici Curiae

ARTCRAFT PRESS, SAN DIEGO, CALIFORNIA

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
INTEREST OF AMICI CURIAE	2
ARGUMENT	5

TABLE OF AUTHORITIES

CASES

Page

Cipriano v. City of Houma (1969) 395 U. S. 701, 706 6

Great Northern Railway Company v. Sunburst Oil & Refining Company (1932) 287 U. S. 258, 364 6

Linkletter v. Walker (1965) 381 U. S. 618 6

Phoenix v. Kolodziejski (1970) ..... U. S. ....., 26 L. Ed. 2d 523, 530 6

Westbrook v. Mihaly (1970) 2 Cal. 3d 765, 87 Cal. Rptr. 839, 471 P. 2d 487 ..... 2n, 5, 6

CONSTITUTIONS AND STATUTES

California Constitution

Sec. 18, Art. XI 2n

Sec. 40, Art. XIII 2n

Code of Civil Procedure, Section 1049 ..... 5n

Elections Code

Secs. 3780-3786 ..... 4n

Sec. 10012 ..... 4n

OTHER AUTHORITIES

California Rules of Court

Rule 24 Subd. (a) 5n

Rule 37 Subd. (a) 5n

Rules of the Supreme Court

Rule 42(4) 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 96

A. T. GORDON, ET AL.,
Petitioners,

vs.

GRANVILLE H. LANCE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

AMICI CURIAE BRIEF

ON BEHALF OF
THE CITY OF SAN DIEGO, CALIFORNIA
AND THE COUNTY OF SAN DIEGO, CALIFORNIA

This brief amici curiae is filed on behalf of the City of San Diego in the State of California and the County of San Diego in the State of California, and is sponsored by the City Attorney of the City of San Diego and the County Counsel of the County of San Diego, who are the authorized law officers thereof, under Rule 42(4) of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Should this Court determine that the extraordinary majority vote requirement imposed by state constitutions and statutes upon the passage of bond measures violates the United States Constitution, what, if any, retroactive effect should be given to the decision?

INTEREST OF AMICI CURIAE

The interest of the City of San Diego, California, and the County of San Diego, California, is that the United States Supreme Court, when it decides the issue regarding the constitutionality of extraordinary majority vote requirements imposed by states upon the passage of bond measures, also determine the retroactive application which may be given to such decision by the courts of the states which impose such requirements. This interest to amici is particularly important in that any decision of the United States Supreme Court should not foreclose the application of such decision in the manner provided by the California Supreme Court in *Westbrook* v. *Mihaly*[1] which case is pending on appeal to this court.

The City of San Diego, pursuant to Ordinance No. 10386, dated August 27, 1970, held a municipal bond election on November 3, 1970, for the purpose of issuing bonds to develop an historical and cultural park. That bond election occurred after the California Supreme Court held a two-thirds affirmative vote requirement violated the Equal Protection Clause of the Fourteenth Amendment, and after that state court decision became final under California court rules.[2]

City Proposition D, appearing on the November 3, 1970 ballot received 103,469 affirmative votes in favor of the City of

---

[1] *Westbrook* v. *Mihaly* (1970) 2 Cal. 3d 765 [87 Cal. Rptr. 839, 471 P. 2d 487] (U. S. Supreme Court Appeal Pending).

[2] *Westbrook* v. *Mihaly*, supra, n. 1. The California Supreme Court in holding a two-thirds affirmative vote requirement of Section 18 of Article XI (new section 40 of Article XIII), California Constitution was invalid, stated that their decision shall ". . . be applied only to elections held after the date upon which this decision becomes final in this court." 2 Cal. 3d 765 at p. 801.

San Diego incurring the bonded indebtedness, and 96,473 negative votes against the assumption of additional indebtedness.

This amounted to 51.07 percent of the electors casting affirmative votes, and 48.93 percent casting negative votes.

The explanation required by law which accompanied the sample ballot mailed to each voter contained the following statement regarding Proposition D:

> "Under present case law it is now uncertain whether this proposition to incur bonded indebtedness must be authorized by an affirmative vote of a simple majority or a majority of two-thirds (2/3) of the qualified electors voting on the bond proposition. If this proposition to incur bonded indebtedness receives the majority number of votes of the qualified voters of the City voting on this proposition, as required by law, general obligation bonds of the City in an amount not to exceed the principal amount stated in the proposition may be issued and sold for the object and purpose as contained in such proposition."

The County of San Diego, pursuant to Resolution No. 99 adopted by the Board of Supervisors of San Diego County August 25, 1970, ordered and held a bond election on November 3, 1970, for the purpose of issuing bonds to acquire real property for open spaces for parks, recreation and other compatible public purposes. That bond proposition, identified as Proposition A on the ballot, received 63.7% of the votes cast, the tally of such votes being:

FOR ISSUANCE OF BONDS	236,326 votes	(63.7+%)
AGAINST ISSUANCE OF BONDS	134,620 votes	(36.3—%)

The resolution of the Board of Supervisors of the County of San Diego adopted on August 25, 1970, ordering this Proposition A to be placed on the ballot, was published in a newspaper of general circulation as required by law for such elections, and a part of such resolution provided:

> "That if the proposition for the incurring of bonded indebtedness so submitted receives the requisite number of votes required by law, bonds of said county, in an amount not exceeding the principal amount stated in such proposition, shall be issued and sold."

The impartial analysis of the bond measure which was mailed[3] to each voter read:

> "Proposition A authorizes the Board of Supervisors to issue and sell general obligation bonds of the County of San Diego not to exceed $7,000,000 to provide funds for the acquisition of real property as open space for parks, recreation and other public purposes compatible therewith. Under the present case law whether these bonds must be authorized by an affirmative vote of a majority or of two-thirds (2/3rds) of the qualified electors voting on the bond proposition is now uncertain. . . ."

Because of the California Supreme Court's decision in the *Westbrook* case and other cases pending in the United States Supreme Court, the uncertainty of the vote required for bond measures to pass was also well publicized in the local press along with newspaper reports and coverage of these bond elections. The electors voting on these propositions—both the proposition submitted by the City of San Diego and the proposition submitted by the County of San Diego—were well apprised of the unsettled state of the law regarding the number of votes required to carry such a proposition.

If the holding of *Westbrook* v. *Mihaly* is approved, the bonds which were approved by majority vote at our elections can

---

[3] An impartial analysis of a bond measure showing the effect of the measure on the existing law and the operation of the measure is required to be prepared, printed and mailed to each voter along with the arguments for and against the measure at least 10 days before the election. (Calif. Elections Code §§ 3780-3786 and 10012.)

be issued and sold if effect may be given to the determination by the California Supreme Court to apply that holding to all elections held after the date that decision became final as to that court.

ARGUMENT

Amici do not argue the issue of whether or not the extraordinary vote requirement for bond measures is constitutionally impermissible. That has been ably and amply presented by the parties to this litigation. But should this honorable court determine that the extraordinary majority vote requirement is invalid, the application of such decision on elections already held must be considered. It is the purpose of amici to note to the court this problem as it relates to them so that this court's decision will neither foreclose the consideration of this matter when the California case of *Westbrook* v. *Mihaly*, now pending on appeal, is considered nor foreclose the application given to the rule by the California Supreme Court.

The California Supreme Court held the extraordinary majority vote requirement for bond elections violative of the United States Constitution, in a decision filed June 30, 1970, and modified July 15, 1970. That decision provided:

> ". . . [W]e consider it fairer and wiser that only prospective effect be given to our decision and that its rule be applied only to elections held after the date upon which this decision becomes final in this court."[4] (*Westbrook* v. *Mihaly*, supra, at 801.)

---

[4] The decision became final under California law on July 30, 1970. "A decision of the [California] Supreme Court becomes final 30 days after filing. . . . Where an opinion is modified [before it becomes final] without change in the judgment . . . such modification shall not postpone the time that the decision becomes final. . . ." (California Rules of Court Rule 24 subd. (a) and Rule 27 subd. (a); cf. California Code Civ. Proc., § 1049.)

After the decision by the California Supreme Court, local agencies in California, particularly the City of San Diego and the County of San Diego, amici herein, ordered bond elections to be held. The attention of the voters was called to the fact that the California Supreme Court had held the extraordinary vote requirement invalid but, because of cases pending in higher courts, a conclusively determinative decision on the vote requirement could not be made. Voters casting their ballots were aware that a majority approval might ultimately be held sufficient for such measures to pass. An implicit or express qualification of such measures is that, should the United States Supreme Court approve or affirm the state's holding, a bond proposition receiving the affirmative approval of a majority of the voters will carry. Many capital projects have been delayed awaiting the decision of this court and, if additional elections are required, additional expenditures of public funds will be necessary.

It has been long recognized by this honorable court that

> "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." (*Great Northern Railway Company* v. *Sunburst Oil & Refining Company* [1932] 287 U. S. 258, 364.)

See *Linkletter* v. *Walker* (1965) 381 U. S. 618, *Cipriano* v. *City of Houma* (1969) 395 U. S. 701, 706, *Phoenix* v. *Kolodziejski* (1970) ..... U. S. ....., 26 L. Ed. 2d 523, 530.

The California Supreme Court in *Westbrook* v. *Mihaly* defined the limits of adherence to the precedent announced in that case: i.e., that the precedent would apply to all elections held after July 30, 1970—the date that decision became final under California law. Thus, if the precedent announced in *Westbrook* v. *Mihaly* is approved or affirmed by this honorable

court, the definition of the limits of adherence announced by the California Supreme Court should not be so limited as to deprive public entities who have relied upon it since the announcement of its benefits.

Respectfully submitted,

JOHN W. WITT, *City Attorney,*
City of San Diego, and
CURTIS M. FITZPATRICK, *Chief Deputy City Attorney*

By: CURTIS M. FITZPATRICK

ROBERT G. BERREY, *County Counsel*
of San Diego County, and
JOSEPH KASE, JR., *Deputy County Counsel*

By: JOSEPH KASE, JR.
Attorneys for Amici Curiae

Dated: January 1971